Supreme Court, U.S.
FILED

1710

No. 10-318

AUG 26 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Kevin H. McKenna
Petitioner – Pro-Se
4885 Adamsville Road
Zanesville, Ohio 43701
(740) 452-3124

August 23, 2010

QUESTIONS PRESENTED

Should an employment **Civil Rights** plaintiff, particularly in the case of a *pro-se* plaintiff, be lawfully entitled to full *opportunity* to enter into a fair stipulation of facts and claims *prior* to a defendant's motion for summary judgment?

In other words:

Should an employment **Civil Rights** plaintiff *lawfully* be afforded a "**Right to be Heard**"?

Because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by; *foreclosing* on the Petitioner's *opportunity* to enter into any stipulation of facts and claims *prior* to the defendant's motion for summary judgment, *and* sanctioned such a departure by the lower court, the petitioner humbly requests:

Will the United States Supreme Court *please* grant the *pro se* Petitioner in this case an exercise of this Court's supervisory power?

PARTIES

The parties are, as represented by the caption to this case:

The petitioner is: Kevin H. McKenna *pro se*.

The respondent is: the Nestle Purina PetCare Co.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CONTENTS (Appendix) vi

TABLE OF AUTHORITIES vii

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

SUMMARY OF CASE 2

STATEMENT OF CASE 3

I. Procedural Background 3

II. District Court Proceedings 5

ARGUMENT 17

I. "Fraud on the Court" 17

a. Fraud on the Court – Party 18

i. "Ro[redacted]tic[1] Relationship" 18

ii. Supervisory "Hostile Environment" (Also Totality of Circumstances) 21

b. Fraud on the Court (by Omission) – Party 24

---

[1] The Respondent's mischaracterization of "relationship(s)" within this case is defamatory upon McKenna. Publishing such a mischaracterization is libelous. Accordingly McKenna has REDACTED all such defamatory mischaracterizations from being published within this Petition.

TABLE OF CONTENTS
(Continued)

Page

i. Omission of Co-worker Retaliatory Harassment Claim (Also Totality of Circumstances) 24

ii. Omission of Material Facts 26

c. Fraud on the Court – lower Courts 27

i. District Court 27

ii. Circuit Court 28

1. Circuit Court Complete Disregard for "*de novo review*" (Re: McKenna's supervisor): 28

2. Circuit Court Complete Disregard for Review of McKenna's Partial MSJ: 29

II. "Totality of Circumstances" 31

III. Inadmissible Evidence 31

a. After Acquired Evidence 31

i. Nestle's *self-made* "**Catch-22**" 34

b. Nonexistent Evidence - "4 *Pornographic Pictures*" Do NOT Exist on the Record 37

IV. The "Right to be Heard" 41

c. Summary Judgment standard 41

i. The Problem: The Absence of Party Stipulation(s): 43

TABLE OF CONTENTS
(Continued)

Page

ii. The Solution: The Dlott "Standing Order", An Employment Discrimination Victim's "Right To Be Heard": 45

REASONS FOR GRANTING 46

I. Title VII Highest Priority 46

a. Critical Opportunity for Vindication of an Important Congressional Policy 46

II. The Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, *and* sanctioned such a departure by a lower court. Justice demands an exercise of this United States Supreme Court's supervisory power (S. Ct. R. 10(a)).....47

b. Lower Court Disregard for *McKennon*.....47

c. Lower Court Disregard for *Harris* ("Totality of Circumstances").....47

d. "Attorney Misconduct"/"Fraud on the Court" 48

i. Case in Chief.....49

ii. Related Case 49

e. Lower Court Disregard for Summary Judgment Standards.....49

CONCLUSION.....50

TABLE OF CONTENTS
(Appendix)

Page

District Court Opinion and Order.....1

Circuit Court Order 28

Circuit Court Denial of Rehearing.....35

Dlott – Standing Order Governing Civil Motions For Summary Judgment 36

Dlott – Exhibit A.....39

2004 – Nestle Termination Memo to McKenna.....42

ORDER: Section IX – Protective Order
Section X – Amend Complaint 43

TABLE OF AUTHORITIES

Page

CASES

Aoude v. Mobil Oil Corp.,
892 F. 2d 1115 (1st Cir.1989).....18

Apotex Corp. v. Merck & Co., Inc.,
507 F. 3d 1357 (Fed. Cir. 2007).....18

Broyhill Furn. Ind., Inc. v. Craftmaster Furn. Co.,
12 F. 3d 1080 (Fed.Cir.1993) 18

Christiansburg Garment Co. v. EEOC,
434 US 412 (1978) 43, 46

Faragher v. Boca Raton,
524 US 775 (1998) 31, 48

Fogerty v. Fantasy, Inc.,
510 US 517 (1994) 43, 46, 49

Great Coastal Exp. v. International Broth., ttc.,
675 F. 2d 1349 (4th Cir.1982) 18

Harris v. Forklift Systems, Inc.,
510 US 17 (1993) 31, 48

McKennon v. Nashville Banner Publishing Co.,
513 US 352 (1995) 31, 33, 36, 46, 47, 49

New York Gaslight Club, Inc. v. Carey,
447 US 54 (1980) 43, 46

Oncale v. Sundowner Offshore Services, Inc.,
523 US 75 (1998) 31, 48

Reeves v. Sanderson Plumbing Products, Inc.,
530 US 133 (2000) 42-43

TABLE OF AUTHORITIES
(continued)

Page

CASES

Shepherd v. American Broadcasting Co.'s, Inc.,
62 F. 3d 1469 (DC Cir. 1995).....48

Tex. Dep't of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981) 37

STATUTES

42 U.S.C. §2000e– 2(a) 1

42 U.S.C. §2000e– 3(a) 1

RULES

FRCP Rule 56 ..... passim

OTHER AUTHORITIES

Southern District of Ohio – Local Rule
7.2(a)(2) 10

OPINIONS BELOW

The United States District Court, Southern District of Ohio, Eastern Division did not publish an opinion in this case, and the Order is reformatted and printed in the Appendix at pp. 1-27.

The United States Court of Appeals for the Sixth Circuit issued a per curium order, did not publish an opinion in this case, and the Order is reformatted and printed in the Appendix at pp. 28-34.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued a *per curium* order on December 23, 2009. Petitioner's timely petition for rehearing and rehearing en-banc was DENIED on March 30, 2010.

On April 13, 2010 Justice Stevens GRANTED Petitioner's Application No. 09A959, and extended the time to file this petition to and including August 27, 2010. This Court has jurisdiction under 28 U.S.C § 1254(1) to review the circuit Court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964,

42 U.S.C. §2000e– 2(a):

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions,

> or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be-cause of such individual's race, color, religion, sex, or national origin." .

42 U.S.C. §2000e– 3(a):

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this sub-chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.".

SUMMARY OF CASE

The lower Courts unlawfully accepted "After Acquired Evidence", non-existent evidence, disregard for requisite totality of circumstances on unheard employment hostile environment claims and the district Court ***fabricated*** facts relied upon in dismissal of all claims and at summary judgment.

STATEMENT OF CASE [1]:

The conduct of the Respondent during these proceedings and the lower Courts has shifted the merits from material issues of this case, to entirely procedural issues.

I. Procedural Background

April 04, 2005 Petitioner Kevin H. McKenna (McKenna) filed an employment discrimination complaint against Nestle with the Ohio Civil Rights Commission (OCRC) [2]. McKenna's OCRC complaint was deferred to the Equal Employment Opportunity Commission (EEOC). June 08, 2010 the EEOC issued notice the charge was being provided to Nestle [3]. June 10, 2005, Nestle received McKenna's complaint from the EEOC [4].

June 15, 2005 Nestle's HR Manager drafted an "Employer Statement" in response to McKenna's EEOC complaint [5]. Significantly the "Employer Statement" drafted by Nestle's *local* HR Manager with "first-hand knowledge" and *directly* involved in the decision to terminate McKenna's employment (Kagenski Dep., p. 201, ll. 1-5), does *not* reference any alleged "*pornographic pictures*"!

July 6, 2005 Nestle submitted Nestle's "Position Statement" to the EEOC now drafted by an attorney from "Nestle North America Legal Depart-

---

[1] If deemed material by this Court, a detailed Statement of Facts is on record with the Circuit of Appeals - Doc: 00615599546 Filed: 06/25/2009 Pages: 11-14; *Id.* Pages: 17-34

[2] Doc: 162-6 Filed: 01/26/09 Page: 57 of 77 PAGEID #: 3326

[3] Doc: 3-1 Filed: 10/28/05 Page: 2 of 23 PAGEID #: 41

[4] Doc: 162-6 Filed: 01/26/09 Page: 61 of 77 PAGEID #: 3330

[5] Doc: 162-6 Filed: 01/26/09 Pages: 59-68 of 77 PAGEIDs #: 3328-3337

ment" [6]. Now for the first time Nestle *attorneys* "articulate" that four (4) "*pornographic pictures*" were relied upon for the termination of McKenna's employment [7].

Nestle's "Position Statement" to the EEOC also cites: "E. Ms. Ellis's Complaint to HR, the Investigation and Termination of Mr. McKenna's Employment. On or about September 24, 2004, Mitzi Link – the supervisor of both Ms. Ellis and Mr. McKenna..." [8]. Nestle reiterated before the District Court: "On August 31, 2004, Plaintiff informed Carol Kagenski, Human Resources Manager ("HR")..."; "On or about September 24, 2004, Mitzi Link, supervisor for both Ms. Ellis and Plaintiff, went to HR with a letter that Ms. Ellis received at her residence from Ms. Goss" [9]

August 03, 2005 the EEOC dismissed McKenna's charge 22A-2005-02413 regarding retaliation and sexual discrimination and issued McKenna's "Right to Sue" [10]. On September 22, 2005, the EEOC dismissed charge 220-2005-018868 regarding unlawful discrimination by McKenna's direct supervisor "Mitzi Link" [11].

October 25, 2005, McKenna filed *pro-se*, a complaint against Nestle in the Federal District Court of Southern Ohio, Eastern Division (District

---

[6] Doc: 136-9 Filed: 05/22/08 Pages: 3-9 of 15 PAGEIDs #: 2488-2494

[7] Doc: 136-9 Filed: 05/22/08 Page: 6 of 15 PAGEID #: 2491

[8] Doc: 136-9 Filed: 05/22/08 Page: 5 of 15 PAGEID #: 2490; Judicial Admission to EEOC "Position Statement" - Doc: 162-3 Filed: 01/26/09 Page: 5 of 7 PAGEID #: 3126

[9] Doc: 18 Filed: 03/07/06 Pages: 2-3 of 10 PAGEIDs #: 159-160

[10] Doc: 3-1 Filed: 10/28/05 Page: 3 of 23 PAGEID #: 42

[11] Doc: 53-1 Filed: 08/21/06 Pages: 4-5 of 15 PAGEIDs #: 746-747

Court). On October 28, '05, McKenna filed an "amended" complaint [12].

II. District Court Proceedings

October 25, 2005 McKenna filed a complaint with the district Court alleging *co-worker* sexual *and retaliatory* harassment, and employer retaliation [13]. On November 2, 2005 McKenna filed an amended complaint directly alleging *retaliatory* act(s)/action(s) by McKenna's co-worker/harasser [14]. McKenna's complaint specifically references as facts to McKenna's claims, that Kagenski was Nestle's "HR Manager" not McKenna's "immediate supervisor" [15], where "Mitzi Link" was McKenna's "immediate supervisor" [16].

November 14, 2005 McKenna filed a motion to appoint counsel [17]. September 11, 2006, ten (10) months after McKenna's request for counsel, the

---

[12] Doc: 1 Filed: 10/25/05 Page: 6 of 7 PAGEID #: 6; Doc: 3 Filed: 10/28/05 Page: 1 of 30 PAGEID #: 10; Doc: 3 Filed: 10/28/05 Pages: 3-6 of 30 PAGEIDs #: 12-15

[13] Doc: 1 Filed: 10/25/05 Page: 6 of 7 PAGEID #: 6 at Statements #3, #5 and #6

[14] "... it is by the defendant's own admission, that they actually and explicitly condoned a *retaliatory act against me by my harasser*." (Doc: 3 Filed: 10/28/05 Page: 3 of 30 PAGEID #: 12)
"2) Explicitly soliciting and/or tendering *retaliatory actions against me from my harasser*" (Doc: 3 Filed: 10/28/05 Page: 3 of 30 PAGEID #: 12).
"• October 4th, 2004 – In direct conflict with the company's "Non-Harassment and Non-Retaliation Policy" (and federal law(s)), Ms. Kagenski explicitly condoned, (if not actually solicited) *retaliatory actions against me from my harasser, Ms. Goss*." (Doc: 3 Filed: 10/28/05 Page: 5 of 30 PAGEID #: 14).

[15] Doc: 1 Filed: 10/25/05 Page: 6 of 7 PAGEID #: 6 at ¶1, ¶¶3-5; Doc: 3 Filed: 10/28/05 Page: 4 of 30 PAGEID #: 13 at ¶1

[16] Doc: 1 Filed: 10/25/05 Page: 6 of 7 PAGEID #: 6 at ¶2; Doc: 3 Filed: 10/28/05 Page: 4 of 30 PAGEID #: 13 at ¶4-5

[17] Doc: 5 Filed: 11/15/05 Page: 1 of 2 PAGEID #: 94

District Court DENIED McKenna's request "without prejudice to reconsidering that issue at a later stage in the case should it appear appropriate" [18]. December 20, 2006 McKenna renewed McKenna's request for counsel [19]. On September 24, 2007 the district Court DENIED with no reference to "without prejudice" or "reconsideration" at a later time [20]. McKenna has been proceeding *pro-se* since the onset of this litigation without any assistance whatsoever.

March 15, 2006 McKenna served formal response to Nestle's discovery requests [21]. McKenna's response to Interrogatory No. 19 states: "The job detriment the Plaintiff suffered as a result of reporting sexual harassment includes, but is not limited to: *Retaliation by Ms. Goss...*" [22]. McKenna has consistently objected to Nestle's attempts to utilize "discovery" as an instrument to support the termination of McKenna's employment. McKenna's formally served "General Objections" to that extent upon Nestle on March 15, 2006 [23].

July 31, 2006 McKenna filed a Motion to Amend the Complaint, that *due to discovery* since the onset of litigation in regards to McKenna's direct supervisor, Mary "*Mitzi*" Link [24].

—

---

[18] Doc: 58 Filed: 09/11/06 Pages: 1-2 of 4 PAGEIDs #: 793-794

[19] Doc: 65 Filed: 12/20/06 Page: 3 of 3 PAGEID #: 815

[20] Doc: 97 Filed: 09/24/07 Page: 2 of 8 PAGEID #: 1408

[21] Doc: 162-4 Filed: 01/26/09 Page: 27 of 43 PAGEID #: 3155

[22] Doc: 162-4 Filed: 01/26/09 Page: 15 of 43 PAGEID #: 3143 at Interrogatory No. 19

[23] Doc: 162-4 Filed: 01/26/09 Pages: 2-6 of 43 PAGEIDs #: 3130-3134; Dated/Signed Verification at Doc: 162-4 Filed: 01/26/09 Pages: 26-27 of 43 PAGEIDs #: 3154-3155

[24] Doc: 49 Filed: 07/31/06 Page: 2 of 5 PAGEID #: 657

August 21, 2006 McKenna's Reply memorandum to his Motion to Amend the Complaint [25] – Includes "Attachment A" [26], evidencing formal disclosure on March 21, 2006 of charges with the EEOC regarding McKenna's direct supervisor, Mary "*Mitzi*" Link.

February 05, 2007 in Opinion and Order, "Section IX" – The district court GRANTED McKenna's Motion to Amend the Complaint [27]. February 15, 2007 Nestle moved for reconsideration regarding "Section X." to the District Judge regarding a **Protective Order** against Nestle's intrusions into "relationships" [28]. Nestle waived any objection on any "jurisdictional or limitations grounds" on McKenna's Motion to Amend the Complaint when Nestle did not request reconsideration "Section IX" – The GRANT of McKenna's Motion to Amend [29].

Nestle's motion for reconsideration acknowledges McKenna's co-worker retaliatory harassment claim where Nestle argued, "The Sixth Circuit has yet to adopt a cause of action based on a co-workers' retaliatory harassment." [30].

March 31, 2008 without stipulation establishing disputed and undisputed facts, evidence or claims, Nestle filed a *scandalous* [31] "Motion for

---

[25] Doc: 53 Filed: 08/21/06 Page: 1 of 9 PAGEID #: 734

[26] Doc: 53-1 Filed: 08/21/06 Page: 1 of 15 PAGEID #: 743

[27] Doc: 77 Filed: 02/05/07 Page: 10 of 11 PAGEID #: 909 **(Appendix p.52)**

[28] Doc: 77 Filed: 02/05/07 Pages: 10-11 of 11 PAGEIDs #: 909-910 **(Appendix pp. 53-54)**

[29] Doc: 78 Filed: 02/15/07 Page: 7 of 8 PAGEID #: 920

[30] Doc: 78 Filed: 02/15/07 Page: 6 of 8 PAGEID #: 919 at ¶3

[31] In violation of a Standing Protective Order: Doc: 77 Filed: 02/05/07 Pages: 10-11 of 11 PAGEIDs #: 909-910 **(Appendix pp. 53-54)**

Summary Judgment" (Nestle MSJ). Nestle's MSJ was supported by innumerable omissions, "After Acquired Evidence", uncorroborated allegations, tampered evidence, perjurious Affidavits, conclusory "articulations", none of which comprise admissible evidence [32].

Nestle's MSJ *again* references McKenna's co-worker retaliation claim: "Plaintiff essentially alleges that *Goss retaliated against him* for reporting Goss's actions to Kagenski" [33]. The *articulations* within Kagenski and DeWitt's affidavits submitted in support of Nestle's MSJ do *not* cite "*pornographic pictures*" were found in McKenna company emails as Nestle *attorneys* articulate [34].

April 1, 2008 McKenna objected to Nestle's MSJ. McKenna *immediately* and simultaneously filed *both* "Formal Notice to the Federal District Court of Southern Ohio, Easter Division, Re: Case No C2-05-976" [35], *and* held "Status Conference re dft's MSJ set for 4/1/2008 at 11:00am by teleconference before Terence P Kemp" [36]. McKenna's objections to Nestle's MSJ included "After Acquired Evidence" at Statement 2(e) [37], and McKenna's handwritten "**Note: It is simply, factually 'impossible' that statements made by Goss in 2006 could have affected Nestle's motives/decisions in 2004!!**" [38].

—

[32] Doc: 127 Filed: 03/31/08 [sealed]
[33] Doc: 127 Filed: 03/31/08 [sealed] at p. 12
[34] Doc: 127 Filed: 03/31/08 [sealed] – "Exhibit A" ¶22(1), and "Exhibit C" ¶5 respectively
[35] Doc: 128 Filed: 04/01/08 Pages: 1-4 of 4 PAGEIDs #: 2202-2205
[36] between Doc's #: 127-128
[37] Doc: 128 Filed: 04/01/08 Page: 2 of 4 PAGEID #: 2203
[38] Doc: 128 Filed: 04/01/08 Page: 4 of 4 PAGEID #: 2205

May 22, 2008 McKenna's Opposition Brief to Nestle's MSJ substantially "disputes" or impeached numerous factual misrepresentations made by Nestle. *Significantly*, McKenna *again* objected admissibility of "After Acquired Evidence" cited in Nestle's MSJ [39].

January 26, 2009 McKenna filed a Motion for Leave to File Instanter with McKenna's very tardy Partial Motion for Summary Judgment attached (McKenna Partial MSJ) specifically regarding: "McKenna's direct Supervisor, Mary "*Mitzi*" Link (hereinafter "*Mitzi*") had unlawful discriminatory (in fact both sexual "anti-male" and retaliatory) animus against McKenna" [40].

February 10, 2009 the District Court GRANTED McKenna leave to file McKenna's Partial MSJ [41], instructed Nestle to file its opposition brief in twenty-one (21) days, and McKenna's reply brief within eleven (11) days thereafter. The District Court admonished McKenna to restrict the length of his reply memoranda.

March 04, 2009 Nestle filed an abusive opposition brief to McKenna's Partial MSJ. Nestle misrepresented to the court McKenna had no claim against McKenna's direct supervisor [42]. Accordingly, only three (3) [43] of the thirty-eight (38) pages are in opposition to McKenna's Partial MSJ specifically regarding McKenna's direct supervisor's sexual and retaliatory animus. [44].

---

[39] Doc: 136 Filed: 05/22/08 Pages: 20-22 of 27 PAGEIDs #: 2427-2429
[40] Doc: 162-1 Filed: 01/26/09 Pages: 8-9 of 71 PAGEIDs #: 3000-3001
[41] Doc: 163 Filed: 02/10/09 Page: 1 of 2 PAGEID #: 3428
[42] Doc: 165 Filed: 03/04/09 Page: 6 of 38 PAGEID #: 3870 at ¶1
[43] Doc: 165 Filed: 03/04/09 Pages: 9-11 of 38 PAGEIDs #: 3873-3875
[44] Doc: 165 Filed: 03/04/09 Page: 9 of 38 PAGEID #: 3873 at ll. 8-11

The remaining thirty-five (35) pages of Nestle's opposition brief against a *pro-se* plaintiff is a de-facto supplemental brief in support of Nestle's MSJ [45] in violation of *S.D. Ohio Loc. R. 7.2(a)(2)* [46]. Nestle conceded to the Court that Nestle's opposition brief was not responsive to McKenna's Partial MSJ, "In short, this Court is permitted to deny Plaintiff's Motion for Partial Summary Judgment on its own *even if Nestle did not respond to the arguments contained therein*" (*emphasis* added) [47].

Contrary Nestle's previous representation of Goss and McKenna's relationship as a "sexual relationship" made in Nestle's MSJ [48] and contrary to Nestle's evidence submitted in support of Nestle's MSJ by: Ellis Affidavit statements #3 and #4 [49] and Kagenski Affidavit statements #10, #11 and #17 [50], Nestle *libelously* misrepresented to the district Court that McKenna was involved in a "r[redacted]c relationship" with Goss *and* Ellis [51].

March 17, 2009 McKenna filed McKenna's reply brief [52]. McKenna objected to Nestle's exploitation of Nestle's opposition brief as de-facto supplemental memoranda to Nestle's MSJ [53].

March 31, 2009 the District Court issued judgment in this civil-rights case comprised of

---

[45] Doc: 127 Filed: 03/31/08 [sealed]

[46] *S.D. Ohio Loc. R.* 7.2(a)(2) states: "No additional memoranda beyond those enumerated will be permitted except upon leave of court for good cause shown".

[47] Doc: 165 Filed: 03/04/09 Page: 9 of 38 PAGEID #: 3873 at ll. 2-3

[48] Doc: 127 Filed: 03/31/08 [sealed] – p. 4, ¶¶ 3-4

[49] Doc: 127 Filed: 03/31/08 [sealed] Exhibit B

[50] Doc: 127 Filed: 03/31/08 [sealed] – Exhibit A

[51] Doc: 165 Filed: 03/04/09 Page: 22 of 38 PAGEID #: 3886 at ll. 12-16

[52] Doc: 166 Filed: 03/17/09 Page: 1 of 24 PAGEID #: 3903

[53] Doc: 166 Filed: 03/17/09 Page: 3 of 24 PAGEID #: 3905 at ll. 3-14

innumerable conclusory/unsupported articulations, highly disputed "After Acquired Evidence", even ***court fabricated*** facts/evidence, all *liberally* construed favorably to the *moving* party. For instance:

1) The district Court adopted Nestle's *libelous* misrepresentation that McKenna had been "r[redacted]cally" involved with Goss *and* Ellis: "Instead, the evidence establishes that Goss's cantankerous behavior towards McKenna was not based on his status as a male, but based on his status as someone with whom she was ro[redacted]-tically involved. Goss treated Ellis, a female, as adversely as McKenna, because Goss believed McKenna and Ellis were r[redacted]cally involved" [54].
2) Accepted *nonexistent evidence* in support of Nestle's proffered reason for the termination of McKenna's employment, counsel's articulation that "*pornographic pictures*" existed in McKenna's company email account: "In the course of investigating McKenna's Outlook folder, Nestle uncovered emails McKenna had sent containing *pornographic pictures* of a female friend and a male stripper in various sexual positions" (*emphasis* added) [55].
3) To dismiss *both* "Gender Discrimination" claim *and* ...
4) ... In support of finding that McKenna could not establish "pretext", contrary to *stipulation by the parties*... the district Court ***fabricated*** that

---

[54] Doc: 168 Filed: 03/31/09 Page: 16 of 22 PAGEID #: 3987 at ll. 6-10 **(Appendix p.18 at ll. 11-17)**

[55] Doc: 168 Filed: 03/31/09 Page: 4 of 22 PAGEID #: 3975 **(Appendix p.4)**

> Kagenski, Nestle's HR Manager was McKenna's direct supervisor in establishing that McKenna and Ellis did not report to the same supervisor: "Although Ellis was subject to the same ECP as McKenna (as were all Nestle employees), Ellis did not deal with the same supervisor as McKenna..." [56]; "As already analyzed by this Court, Ellis was not 'similarly situated' to McKenna because she did not deal with the same supervisor as McKenna..." [57].

Furthermore, not only did the district court **DENY** McKenna's Partial MSJ, the district court completely disregarded McKenna's Partial MSJ. This fact is clearly evidenced by: Ninety-five (95) pages of memoranda, three-hundred and sixty-four (364) pages of exhibits for a total of four-hundred and fifty-nine (459) pages of McKenna's Partial MSJ was based upon the *stipulation* that Mary "*Mitzi*" Link was McKenna's direct supervisor. Within McKenna's Partial MSJ "*Mitzi*" was referenced two-hundred and seventeen (217) times; as McKenna's "supervisor" seventy-seven (77) times; and specifically referenced "*Mitzi*" as McKenna's "direct supervisor" thirteen (13) times; for a total of three-hundred and seven (307) references to Mary "*Mitzi*" Link as McKenna's direct supervisor; and the district Court still references *Kagenski* as McKenna's direct supervisor.

June 25, 2009 McKenna's Appellant Brief was filed with the Circuit Court. Significantly, "*Mitzi*" was referenced an *additional* sixty-five (65) times; as

---

[56] Doc: 168 Filed: 03/31/09 Page: 14 of 22 PAGEID #: 3985 at ll. 6-8 **(Appendix p.15 at end of page)**

[57] Doc: 168 Filed: 03/31/09 Page: 21 of 22 PAGEID #: 3992 at ll. 12-14 **(Appendix p.24 at ll. 11-14)**

McKenna's "supervisor" an *additional* fifty-three (53) times; and specifically referenced "*Mitzi*" as McKenna's "direct supervisor" an *additional* thirteen (13) times; for a total of one-hundred and thirty-seven (137) *additional* references to Mary "*Mitzi*" Link as McKenna's direct supervisor, for a *total* of four-hundred and forty-four (444) references to Mary "*Mitzi*" Link as McKenna's direct supervisor before the Circuit Court. Furthermore, this issue was raised before the Circuit Court as "**ARGUMENT – A. – Errant Factual Findings:**" [58].

McKenna's Appellant Brief also raised the district Court accepted as admissible evidence of Nestle's proffered reason for the termination of McKenna's employment, counsel's articulation that non-existent "*pornographic pictures*" allegedly existed in McKenna's company email account [59]. McKenna also raised the issue of Nestle's reliance upon and the District Court's "After Acquired Evidence" [60]. McKenna specifically appealed to the Circuit Court, to review McKenna's Partial MSJ, in specific regards to McKenna's immediate supervisor Mary "*Mitzi*" Link [61].

July 27, 2009 Nestle's Opposition Brief conceded: "Nestle concedes that Link was the supervisor for McKenna and Ellis" [62]. Nestle *again* "articulated" without citation to supporting exhibit that "Reasonable Minds Could Only Conclude..." that "*pornographic pictures*" were discovered in

---

[58] Doc: 00615599546 Filed: 06/25/2009 Pages: 35-37
[59] Doc: 00615599546 Filed: 06/25/2009 Pages: 64-66
[60] Doc: 00615599546 Filed: 06/25/2009 Pages: 70-72
[61] Doc: 00615599546 Filed: 06/25/2009 Page: 17
[62] Doc: 00615621584 Filed: 07/27/2009 Page: 20 at ll. 10-12

McKenna's company email account [63]. Nestle *again* acknowledges McKenna's *co-worker retaliation* claim at section "VI": "McKenna specifically stated that Goss retaliated against him:" [64].

September 02, 2009 McKenna's Appellant Reply Brief addressed the *libelous* assertion that McKenna had been "r[redacted]cally" involved [65] with Goss and Ellis. McKenna's Appellant Reply Brief disputed Nestle's "articulation" regarding "*pornographic pictures*" [66]. McKenna argued support for McKenna's disregarded co-worker retaliation claim at section "B. COWORKER RETALIATORY HARASSMENT" [67].

December 23, 2009 the Circuit Court affirmed citing:

1) "Kevin H. McKenna, an Ohio resident proceeding *pro-se, appeals a district court's judgment* granting the defendant's motion for summary judgment, *denying McKenna's motion for partial summary judgment*, and dismissing McKenna's amended complaint" [68].
2) "We review the grant or denial of summary judgment *de novo. Yeschick v. Mineta*, 521 F.3d 498, 502 (6th Cir. 2008)" [69].
3) "Instead, the evidence shows that the alleged harassers' actions toward McKenna were based on personal conflict resulting from the fact that

---

[63] Doc: 00615621584 Filed: 07/27/2009 Page: 24
[64] Doc: 00615621584 Filed: 07/27/2009 Page: 30
[65] Doc: 00616152349 Filed: 09/02/2009 Pages: 11-20
[66] Doc: 00616152349 Filed: 09/02/2009 Pages: 72-78
[67] Doc: 00616152349 Filed: 09/02/2009 Pages: 44-47
[68] Doc: 00618042195 Filed: 12/23/2009 Page: 1 at ll. 1-3
(Appendix p.28 at ll. 1-5)
[69] Doc: 00618042195 Filed: 12/23/2009 Page: 2 at ll. 3-4
(Appendix p.29 at ll. 13-14)

McKenna had engaged in r[redacted]c relationships with them" [70].

4) "McKenna has established that he engaged in a protected activity when he complained to his *supervisor Carol Kagenski*, concerning a co-worker's actions [71].
5) "Nestle asserts that it terminated McKenna's employment because he violated the terms of its Electronic Communications Policy ("ECP") by sending and receiving *sexually explicit* emails and *photos* using his work computer [72].

On January 06, 2010 McKenna filed a Petition for Rehearing raising issues of:

1) The *libelously* represented "r[redacted]c relationship" [73].
2) Circuit Courts dereliction of duty to conduct "de novo" review perpetuating the misrepresentation that McKenna's supervisor was Kagenski [74].
3) "Totality of Circumstances" [75].
4) "Retaliatory Harassment" Supervisory and Co-worker [76].
5) "After Acquired Evidence" [77].

---

[70] Doc: 00618042195 Filed: 12/23/2009 end of Page 2 – begin of Page 3 **(Appendix p.30 at ll. 23-27)**

[71] Doc: 00618042195 Filed: 12/23/2009 Page: 3 at ¶3 **(Appendix p.31 at end of page)**

[72] Doc: 00618042195 Filed: 12/23/2009 Page: 4 at ll. 3-5 **(Appendix p.32 at ¶2)**

[73] Doc: 00618354969 Filed: 01/06/2010 Pages: 11-13

[74] Doc: 00618354969 Filed: 01/06/2010 Pages: 13-14

[75] Doc: 00618354969 Filed: 01/06/2010 Page: 17

[76] Doc: 00618354969 Filed: 01/06/2010 Page: 18

[77] Doc: 00618354969 Filed: 01/06/2010 Page: 19

January 11, 2010 pursuant to 6 Cir. Rule 46, McKenna filed a complaint of "Attorney Misconduct" with the Circuit Court. McKenna's complaint references *instances* in which *perjury* had been expressly raised within the body of briefings before the federal judiciary:

May 22, 2008 – Federal District Court, McKenna's Opposition to Nestle's Motion for Summary Judgment [78]; *January 26, 2009* – Federal District Court, McKenna's Partial Motion for Summary Judgment, [79]; *March 17, 2009* – Federal District Court, McKenna's Partial Motion for Summary Judgment - REPLY Memorandum, [80]; *June 25, 2009* – Sixth Circuit of Appeals, *Pro-Se* Appellant's Brief [81]; *September 2, 2009* – Sixth Circuit of Appeals, *Pro-Se* Appellant's REPLY Brief, [82].

February 2, 2010, the Circuit Court issued notice McKenna's complaint was docketed as **Case No. 10-9501** [83]. McKenna's initial complaint "clearly and convincingly" evidences "Fraud on the Court", subornation of fraud, perjury, and evidence tampering. McKenna has repeatedly supplemented **Case No. 10-9501** with further evidence of "Attorney Misconduct".

March 30, 2010 the Circuit Court disregarded McKenna's pending complaint of "Attorney Misconduct" and **DENIED** McKenna's petition for rehearing [84]

---

[78] Doc: 136 Filed: 05/22/08 Pages: 5-7 of 27 PAGEIDs #: 2412-2414
[79] Doc: 162-1 Filed: 01/26/09 Page: 49 of 71 PAGEID #: 3041 at FN149
[80] Doc: 166 Filed: 03/17/09 Pages: 18-19 of 24 PAGEIDs #: 3920-3921
[81] Doc: 0061559954 Pages 82-86
[82] Doc: 00616152349 Pages 60-61 and pp. 69-72
[83] Application 09A959, Attachment B at p. 38
[84] Doc: 00619964974 Filed: 03/30/2010 Page: 1

April 13, 2010 Justice Stevens GRANTED Petitioners Application No. 09A959 extending the time to file a petition for a writ of certiorari by 60 days, to and including August 27, 2010.

July 13, 2010, McKenna served Notice upon the Circuit Executive also supplemented to **Case No. 10-9501**, in an attempt to expedite administrative resolution of the material issues of "Attorney Misconduct".

August 03, 2010 pursuant to the Federal Rules of Civil Procedure Rule 60(d)(3) McKenna filed "Plaintiff's Motion Set Aside a Judgment For Fraud on the Court" [85], again providing "clear and convincing evidence" to the lower Courts of "Attorney Misconduct".

ARGUMENT

I. "Fraud on the Court"

By leaving McKenna's January 11, 2010 [86] and August 03, 2010 [87] complaints of "Attorney Misconduct"/"Fraud on the Court" unresolved within the context of summary judgment, where law mandates all disputes are *liberally* construed favorably to the non-moving *pro-se* litigant; perversely raises McKenna's evidentiary burden *beyond* "preponderance of the evidence" requirement in civil proceedings, to a "clear and convincing" evidentiary burden against a non-moving party in the context of summary judgment.

---

[85] Doc: 176 Filed: 08/03/10 Page: 1 of 6 PAGEID #: 4018
[86] Sixth Circuit Case No. 10-9501 [sealed]
[87] Doc: 176 Filed: 08/03/10 Page: 1 of 6 PAGEID #: 4018

> "A "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier *or unfairly hampering the presentation of the opposing party's claim* or defense" (*emphasis* added) *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir.1989).
>
> "Thus "fraud on the court" is typically confined to the most egregious cases, such as bribery of a judge or juror, *or improper influence exerted on the court by an attorney*, in which the integrity of the court and its ability to function impartially is directly impinged. (*emphasis* added) *Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp.*, 12 F.3d 1080, 1085-86 (Fed.Cir.1993) citing *Great Coastal Express, Inc. v. International Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir.1982); Cf. *Apotex Corp. v. Merck & Co., Inc.*, 507 F.3d 1357, 1361 (Fed. Cir. 2007).

a. **Fraud on the Court – Party:**

i. **"R[redacted]c Relationship"**

Contrary Nestle's representation of a "sexual relationship" made in support of Nestle's MSJ on March 31, 2008 [88], contrary to evidence submitted in support of Nestle's MSJ by: Ellis Affidavit statements #3 and #4 [89]; Kagenski Affidavit statements

---

[88] Doc. 127: [sealed] – p. 4, ¶¶ 3-4
[89] Doc. 127: [sealed] – Exhibit B

#10, #11 and #17 [90]. Contrary to McKenna and Goss the actual parties to the "relationship", McKenna's Interrogatory response filed in support of McKenna's Partial MSJ [91] Goss's deposition testimony, *Goss Depo. Tr.* p. 19, ll. 18-24:

18 A. Kevin and I had a relationship.
19 MR. McKENNA: You're also assuming facts not
20 admitted into evidence.
21 Q. What type of relationship was it?
22 A. Kevin and I had -- initially had a working
23 relationship which became a friendship which became a
24 *sexual relationship.*

Nestle utilized it's opposition brief to McKenna's Partial MSJ regarding Supervisory Sexual and Retaliatory Harassment, as a supplemental pleading made without leave of court in support of Nestle's MSJ, *defaming* McKenna, McKenna's wife and McKenna's marriage by *libelously* publishing:

> "Goss's behavior towards Plaintiff was not based on his status as a male, but based on his status as someone with whom she was *ro*[redacted]*tically* involved. Goss treated Ellis, a female, adversely as well because Goss believed Plaintiff and Ellis were *r*[redacted]*cally* involved." [92].

The District Court adopted Nestle's *libelous* "articulation" then liberally construed most favorably to the moving party as to what such a relationship

---

[90] Doc: 127: [sealed] – Exhibit A
[91] Interrogatory No. 9: Doc: 162-4 Filed: 01/26/09 Pages: 39-40 of 43 PAGEID #: 3167-3168
[92] Doc: 165 Filed: 03/04/09 Page: 22 of 38 PAGEID #: 3886 at ll. 12-15

"*can be*" in dismissing McKenna's sexual harassment claim on March 31, 2009 stating:

> "Instead, the evidence establishes that Goss's cantankerous behavior towards McKenna was not based on his status as a male, but based on his status as someone with whom she was r[redacted]cally involved. Goss treated Ellis, a female, as adversely as McKenna, because Goss believed McKenna and Ellis were ro[redacted]-tically involved. (McKenna Depo. Tr. at p. 343; Goss Depo Tr. at p. 36.) Thus, Goss's behavior *can be* described merely as "personal animosity," which is not the equivalent of sexual harassment." [93].

Contrary to the notion of "*de novo review*" and being presented with citations to the record that Goss's animus towards McKenna was "based on sex" [94], the Circuit Court deferred to the District Court's unsupported finding in affirming dismissal of McKenna's sexual harassment claim on December 23, 2009 stating:

> "Instead, the evidence shows that the alleged harassers' actions toward McKenna were based on personal conflict resulting from the fact that McKenna had engaged in *r*[redacted]*c* relationships with them" [95].

There is no evidence on any record that establishes that McKenna has shared a "r[redacted]c"

---

[93] Doc: 168 Filed: 03/31/09 Page: 16 of 22 PAGEID #: 3987 at ll. 6-12 **(Appendix p.18 at ll. 18-20)**

[94] Doc: 00616152349 Filed: 09/02/2009 Pages: 11-20

[95] Doc: 00618042195 Filed: 12/23/2009 end of Page 2 – begin of Page 3 **(Appendix p.30 at ll. 23-27)**

relationship with McKenna's STALKER, Goss. Not even the delusional, psychotic STALKER Goss has ever inferred that Goss and McKenna shared a "r[redacted]c" relationship.

ii. **Supervisory "Hostile Environment" (Also Totality of Circumstances)**

On July 31, 2006 McKenna filed a Motion to Amend McKenna Complaint due to *discovery* subsequent to the onset of litigation [96].

> **"PLAINTIFF'S "SUPPLEMENTAL STATEMENT OF CLAIM" (JULY 21, 2006):**
>
> The Plaintiff, Kevin H. McKenna's "Supplemental Statement of Claim" is: That in addition to the Claims set forth within the original "Statement of Claim" is that: I, Kevin H. McKenna was subjected to an unlawful, "Hostile Environment" because of my "sex". My co-workers and immediate supervisor Mary "Mitzi" Link imposed this hostile environment upon me. The Defendant's upper management and supervision failed to remedy, acquiesced it, if not actually supported and/or sponsored the unlawful acts." [97].

On August 21, 2006 McKenna's Reply memorandum to his Motion to Amend the Complaint [98] – Includes "Attachment A" [99], evidencing formal disclosure made upon Nestle's Attorneys regarding charges regarding McKenna's direct supervisor filed

---

[96] Doc: 49 Filed: 07/31/06 Page: 2 of 5 PAGEID #: 657
[97] Doc: 49-2 Filed: 07/31/06 Page: 2 of 2 PAGEID #: 662
[98] Doc: 53 Filed: 08/21/06 Page: 1 of 9 PAGEID #: 734
[99] Doc: 53-1 Filed: 08/21/06 Page: 1 of 15 PAGEID #: 743

with the EEOC on March 21, 2006 shortly after the onset of discovery in the case.

On February 05, 2007 in Opinion and Order, Section IX – The district court GRANTED McKenna's Motion to Amend the Complaint citing:

> "If Nestle believes the claim is then subject to dismissal on jurisdictional or limitations grounds, it may file an appropriate motion and obtain a ruling from the District Judge assigned to the case." [100].

On February 15, 2007 Nestle requested reconsideration of "Section X." to the District Judge regarding a Protective Order against Nestle's intrusive discovery practices [101]. Nestle waived any objection on any "jurisdictional or limitations grounds" when Nestle did not request reconsideration of "Section IX" – The district court GRANT of McKenna's Motion to Amend.

On January 26, 2009 McKenna filed McKenna's Partial MSJ in specific regards to: "McKenna's direct Supervisor, Mary "*Mitzi*" Link (hereinafter "*Mitzi*") had unlawful discriminatory (in fact both sexual "anti-male" and retaliatory) animus against McKenna" [102].

On March 04, 2009 in opposition to McKenna's Partial MSJ, Nestle misrepresented to the district court that McKenna had no claim(s) against McKenna's direct supervisor:

---

[100] Doc: 77 Filed: 02/05/07 Page: 9 of 11 PAGEID #: 908
[101] Doc: 78 Filed: 02/15/07 Page: 7 of 8 PAGEID #: 920
[102] Doc: 162-1 Filed: 01/26/09 Pages: 8-9 of 71 PAGEIDs #: 3000-3001

> "I. Introduction:
>
> On October 25, 2005, Plaintiff Kevin H. McKenna (hereinafter "Plaintiff") filed his Complaint. See doc. #1. On November 2, 2005, Plaintiff filed and Amended Complaint. See Doc. #3. Plaintiff's Complaint and Amended Complaint never once state, of even suggest, that Mitzi Link (hereinafter "Link") discriminated against Plaintiff; yet, a large portion of Plaintiff's Partial Motion for Summary Judgment (hereinafter "Plaintiff's Motion") discusses alleged discrimination by Link. *There is no claim for relief contained or sought within any of Plaintiff's complaint for discrimination based upon Link's alleged conduct.* [103]

Nestle deceives the Court by citing McKenna's initial Complaint, while averting the Court's attention away McKenna's subsequent assertion of a claim against McKenna's direct supervisor Mary "*Mitzi*" Link. Consequentially the lower Courts' have completely disregarded McKenna's claim against his direct supervisor Mary "*Mitzi*" Link. That *fact* is inarguably evidenced by: *neither* of the lower Courts apprehends the supreme material fact that Mary "*Mitzi*" Link is McKenna's direct supervisor, and perversely cites Kagenski as McKenna's supervisor [104].

---

[103] Doc: 165 Filed: 03/04/09 Page: 6 of 38 PAGEID #: 3870 at ¶1

[104] Doc: 168 Filed: 03/31/09 Page: 3 of 22 PAGEID #: 3974 at ll. 1-2 **(Appendix p.3 at ll. 7-8);**
Doc: 00618042195 Filed: 12/23/2009 Page: 3 at ¶3 **(Appendix p.31 at end of page)**

b. **Fraud on the Court (by Omission) - Party**

i. **Omission of Co-worker Retaliatory Harassment Claim (Also Totality of Circumstances)**

Sufficient Notice of McKenna's Co-worker Retaliatory Harassment Claim:

October 25, 2005 McKenna filed a complaint with the district Court alleging *co-worker* sexual *and retaliatory* hostile environment, and employer retaliation [105]. On November 2, 2005 McKenna filed an amended complaint directly alleging *retaliatory* act(s)/action(s) against McKenna by his co-worker/ harasser:

1) "... it is by the defendant's own admission, that they actually and explicitly condoned a *retaliatory act against me by my harasser.*" [106].
2) "2) Explicitly soliciting and/or tendering *retaliatory actions against me from my harasser*" [107].
3) "• October 4th, 2004 – In direct conflict with the company's "Non-Harassment and Non-Retaliation Policy" (and federal law(s)), Ms. Kagenski explicitly condoned, (if not actually solicited) *retaliatory actions against me from my harasser, Ms. Goss.*" [108].

On March 15, 2006 McKenna served formal response to Nestle's *first* discovery requests [109]. In

---

[105] Doc: 1 Filed: 10/25/05 Page: 6 of 7 PAGEID #: 6 at Statements #3, #5 and #6
[106] Doc: 3 Filed: 10/28/05 Page: 3 of 30 PAGEID #: 12
[107] Doc: 3 Filed: 10/28/05 Page: 3 of 30 PAGEID #: 12
[108] Doc: 3 Filed: 10/28/05 Page: 5 of 30 PAGEID #: 14
[109] Doc: 162-4 Filed: 01/26/09 Page: 27 of 43 PAGEID #: 3155

response to Nestle's Interrogatory No. 19, McKenna stated: "The job detriment the Plaintiff suffered as a result of reporting sexual harassment includes, but is not limited to: *Retaliation by Ms. Goss...*" [110].

On February 15, 2007 in Nestle's request for reconsideration, Nestle acknowledges McKenna's co-worker retaliatory harassment claim at section "C." where Nestle argued, "The Sixth Circuit has yet to adopt a cause of action based on a co-workers' retaliatory harassment." [111].

On March 31, 2008 Nestle's MSJ *again* references McKenna's co-worker retaliation claim: "Plaintiff essentially alleges that *Goss retaliated against him* for reporting Goss's actions to Kagenski" [112]. Despite Nestle's irrefutable knowledge of McKenna's Supervisory and Co-worker retaliatory harassment claims, Nestle's MSJ [113] misrepresents that McKenna's claims against Nestle were solely "sexual harassment" and "retaliatory termination".

The "SUMMARY" within Nestle's MSJ at page "ii", ¶2 misrepresents a sole "retaliation" claim by termination of McKenna's employment. At ¶4 Nestle misrepresents a sole claim of "sexual harassment". Nestle reiterates misrepresenting McKenna's claims in the "Memorandum in Support – Introduction": "Plaintiff's Complaint asserts a claim for *retaliation* and *sexual harassment*" [114]. Nestle's "CONCLUSION" reiterates that Nestle is entitled to "summary

---

[110] Doc: 162-4 Filed: 01/26/09 Page: 15 of 43 PAGEID #: 3143 at Interrogatory No. 19

[111] Doc: 78 Filed: 02/15/07 Page: 6 of 8 PAGEID #: 919 at ¶3

[112] Doc: 127 Filed: 03/31/08 [sealed] at p. 12

[113] Doc: 127 Filed: 03/31/08 [sealed]

[114] Doc: 127 Filed: 03/31/08 [sealed] at p. 2

judgment" on the basis of "retaliation" by wrongful termination and "sexual harassment" [115].

The district Court's reliance on Nestle's misrepresentations is irrefutable: "This matter is before the Court on Defendant's and Plaintiff's Cross Motions for Summary Judgment. Plaintiff Kevin McKenna ("McKenna") sued Nestle Purina Petcare ("Nestle"), his former employer, asserting a claim for *retaliatory termination* and a claim for *sexual harassment*." (*emphasis* added) [116]. "For the foregoing reasons, the Court... ... GRANTS Nestle's Motion for Summary Judgment with respect to *all* of McKenna's claims" (*emphasis* added) [117].

ii. Omission of Material Facts

Nestle clearly has the capacity to accurately portray the roles of material individuals in this case:

1) On July 6, 2005 Nestle stated in Nestle's "Position Statement" to the EEOC "E. Ms. Ellis's Complaint to HR, the Investigation and Termination of Mr. McKenna's Employment. On or about September 24, 2004, Mitzi Link – the supervisor of both Ms. Ellis and Mr. McKenna..." [118].
2) On March 07, 2006 Nestle reiterated to the district court, "On August 31, 2004, Plaintiff informed Carol Kagenski, Human Resources

---

[115] Doc: 127 Filed: 03/31/08 [sealed] at p. 28, ll. 3-6

[116] Doc: 168 Filed: 03/31/09 Page: 1 of 22 PAGEID #: 3972 at "Introduction" **(Appendix p.1)**

[117] Doc: 168 Filed: 03/31/09 Page: 22 of 22 PAGEID #: 3993 at "Conclusion" **(Appendix p.25)**

[118] Doc: 136-9 Filed: 05/22/08 Page: 5 of 15 PAGEID #: 2490; Judicial Admission to EEOC Position Statement - Doc: 162-3 Filed: 01/26/09 Page: 5 of 7 PAGEID #: 3126

> Manager ("HR")..."; "On or about September 24, 2004, Mitzi Link, supervisor for both Ms. Ellis and Plaintiff, went to HR with a letter that Ms. Ellis received at her residence from Ms. Goss" [119].

However in Nestle's MSJ to deceive the Court by omission that Mary "*Mitzi*" Link was Ellis and McKenna's "direct supervisor", Nestle portrayed "*Mitzi*" as merely *another Nestle Supervisor*:

> "In the meantime, Goss approached *another Nestle supervisor*, Mitzi Link (hereinafter "Link")..." [120].

Nestle's omission of this supreme material fact opportuned the district Court to ***fabricate*** who McKenna's direct supervisor was.

c. Fraud on the Court – lower Courts

i. District Court

In disposing of all McKenna's claims, the district Court disregarded (459) pages of citations, exhibits and evidence within McKenna's Partial MSJ with three-hundred and seven (307) references to Mary "*Mitzi*" Link as McKenna's direct supervisor; without any possible supporting evidence the district Court assigned Kagenski the Human Resources Manager as McKenna's direct supervisor:

> "Shortly thereafter, on August 31, 2004, *McKenna met with his immediate supervisor, Carol Kagenski* ("Kagenski"), and complained

---

[119] Doc: 18 Filed: 03/07/06 Pages: 2-3 of 10 PAGEIDs #: 159-160
[120] Doc: 127 Filed: 03/31/08 [scaled] at p. 6, ll. 15-16

about Goss's changed, more hostile, demeanor towards him" (*emphasis* added) [121].

The district Court utilized that misrepresentation as an instrument to establish that McKenna and Ellis did not report to the same supervisor to dispose of McKenna's claims: "Although Ellis was subject to the same ECP as McKenna (as were all Nestle employees), Ellis did not deal with the same supervisor as McKenna..." [122]: "As already analyzed by this Court, Ellis was not 'similarly situated' to McKenna because she did not deal with the same supervisor as McKenna..." [123].

ii. **Circuit Court**

"We review the grant or denial of summary judgment de novo" [124]. The *de novo* standard of review affords no deference to the lower court.

1. **Circuit Court Complete Disregard for "*de novo review*" (Re: McKenna's Supervisor)**

On June 25, 2009 McKenna's Appellant Brief cited one-hundred and thirty-seven (137) *additional* references to Mary "*Mitzi*" Link as McKenna's direct supervisor, for a *grand total* of four-hundred and forty-four (444) references to Mary "*Mitzi*" Link as McKenna's direct supervisor before the Circuit Court. Furthermore, this exact issue was raised as

---

[121] Doc: 168 Filed: 03/31/09 Page: 3 of 22 PAGEID #: 3974 at ll. 1-3 **(Appendix p.3 at ll. 7-8)**

[122] Doc: 168 Filed: 03/31/09 Page: 14 of 22 PAGEID #: 3985 at ll. 6-8 **(Appendix p.15 at end of page)**

[123] Doc: 168 Filed: 03/31/09 Page: 21 of 22 PAGEID #: 3992 at ll. 12-14 **(Appendix p.24 at ll. 11-14)**

[124] Doc: 00618042195 Filed: 12/23/2009 Page: 2 at l. 3 **(Appendix p.29 at l. 13)**

"ARGUMENT – A. – Errant Factual Findings:" before the Circuit of Appeals [125].

On July 27, 2009 Nestle's Opposition Brief conceded: "McKenna argues that the District Court erred in determining McKenna and Ellis were not similarly situated because they did not share the same supervisor. Nestle concedes that Link was the supervisor for McKenna and Ellis" (emphasis added) [126].

On December 23, 2009 in deference to the district Court, the Circuit Court *republished* the district Court's fatal error, "... when he complained to his supervisor Kagenski" [127].

This representation was ***fabricated*** by the district Court on March 31, 2009, and only exists within the District Court's Order and Opinion. For this exact same error to repeat itself within the Circuit Court's Order after it was expressly raised and conceded to by Nestle before the Circuit Court, it is self-evident that the Panel has not discharged its self-stated duty to review this case "de novo" as is required by law.

2. Circuit Court Complete Disregard for Review of McKenna's Partial MSJ

McKenna specifically appealed to the Circuit Court, to review McKenna's Partial MSJ, in specific regards to McKenna's immediate supervisor Mary "*Mitzi*" Link:

---

[125] Doc: 00615599546 Filed: 06/25/2009 Pages: 35-37
[126] Doc: 00615621584 Filed: 07/27/2009 Page: 20 at ll. 10-12
[127] Doc: 00618042195 Filed: 12/23/2009 Page. 3 at ll. 22-23

(Appendix p.31 at end of page)

> McKenna also humbly and not only *requests this Court review* (the admittedly very tedious/onerous task) de novo the District Courts DENIAL of *McKenna's (Pro-Se) Partial Motion for Summary Judgment*, not only *on its own merits*, but additionally the facts and evidence also there within, be justly considered (most favorably to McKenna) in opposition to Nestle's Motion for Summary Judgment [128].

The Circuit Court judgment acknowledged McKenna's appeal requesting review of the district Court's denial of McKenna Partial MSJ regarding McKenna's direct supervisor's *retaliatory harassment* of McKenna:

> "Kevin H. McKenna, an Ohio resident proceeding *pro-se*, *appeals a district court's judgment* granting the defendant's motion for summary judgment, *denying McKenna's motion for partial summary judgment*, and dismissing McKenna's amended complaint" [129].

The Circuit Court's disregard for review the district Court's denial of McKenna's Partial MSJ is evidenced by the complete absence within the Circuit Court's Order, *and* further evidenced by the fact the Circuit Court references Kagenski as McKenna's supervisor [130].

---

[128] Doc: 00615599546 Filed: 06/25/2009 Page: 17

[129] Doc: 00618042195 Filed: 12/23/2009 Page: 1 at ll. 1-3
(Appendix p.28 at ll. 1-5)

[130] Doc: 00618042195 Filed: 12/23/2009 Page: 3 at ¶3
(Appendix p.31 at end of page)

II. "Totality of Circumstances"

> "[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. at 2283

Nestle's unconscionable scheme calculated to misrepresent McKenna's claims to the lower Courts, and the lower Courts consequential adoption of that misrepresentation and subsequent disregard of McKenna's Supervisory *and* Co-worker Retaliatory Harassment Claims, makes the dismissal of *any* of McKenna's claims against Nestle untenable.

III. Inadmissible Evidence

a. After Acquired Evidence

> "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. at 362-63.

McKenna has consistently objected to Nestle's exploitation of "After Acquired Evidence".

March 15, 2006 McKenna formally served McKenna's "General Objections" to that extent upon Nestle [131].

April 1, 2008 *within less than 19 hours* of actual electronic service of Nestle's MSJ on March 31, 2008 at 5:50PM; McKenna's objection was drafted and including over an hours travel time from Zanesville to Columbus, Ohio manually time-stamped and filed by the district Court "08 APR-1 PM 12:49" [132]. McKenna's *immediate* objection to Nestle's MSJ included inadmissible "After Acquired Evidence" at Statement 2(e) [133], and McKenna's handwritten "**Note: It is simply, factually 'impossible' that statements made by Goss in 2006 could have affected Nestle's motives/decisions in 2004!!**" [134].

May 22, 2008 McKenna's Opposition Brief to Nestle's MSJ again objected admissibility of "After Acquired Evidence" cited in Nestle's MSJ [135].

June 25, 2009 McKenna's Appellant Brief also raised the issue of Nestle's reliance upon and the District Court's *carte-blanche* acceptance of Nestle's "After Acquired Evidence" [136].

January 06, 2010 McKenna's Petition for Rehearing raised the issue of Abuse of "After Acquired Evidence" [137].

---

[131] Doc: 162-4 Filed: 01/26/09 Pages: 2-6 of 43 PAGEIDs #: 3130-3134. Dated/Signed Verification at Doc: 162-4 Filed: 01/26/09 Pages: 26-27 of 43 PAGEIDs #: 3154-3155

[132] Doc: 128 Filed: 04/01/08 Page: 1 of 4 PAGEID #: 2202

[133] Doc: 128 Filed: 04/01/08 Page: 2 of 4 PAGEID #: 2203

[134] Doc: 128 Filed: 04/01/08 Page: 4 of 4 PAGEID #: 2205

[135] Doc: 136 Filed: 05/22/08 Pages: 20-22 of 27 PAGEIDs #: 2427-2429

[136] Doc: 00615599546 Filed: 06/25/2009 Pages: 70-72

[137] Doc: 00618354969 Filed: 01/06/2010 Page: 19

In this case, the perversion of Nestle's reliance upon "After Acquired Evidence" is more egregious than as articulated by this Court in *McKennon*. Nestle's reliance upon "After Acquire Evidence" procured from *Goss* against McKenna is three-fold:

1) "After Acquired Evidence (*McKennon*): *Any* evidence whatsoever, such as Goss's deposition in October of 2006 that was *acquired* by Nestle *after* the decision to terminate McKenna's employment on October 14, 2004 is *inadmissible* by the doctrine of "After Acquired Evidence". *Any* evidence, fact or articulation that is now supported by any variation of "*Goss Depo. Tr.*" submitted in support of either lower Court's judgments and/or Nestle's MSJ, is *inadmissible*.

2) Harassment (sexual and retaliatory): Goss's allegations are part and parcel to the sexual *and* retaliatory harassment by Goss that McKenna adamantly complains of as McKenna's punishment for not submitting to Goss's sexual desires *and* complaining of Goss's harassment to Nestle's HR Manager. *Any* act whatsoever by Nestle opportuning Goss to *now* impugn McKenna in *any* way, is express sponsorship by Nestle of Goss's sexual *and* retaliatory harassment upon McKenna.

It is only *after* McKenna no longer submitted to Goss's *sexual* demands *at the workplace* in July 2004, *and* only *after* McKenna *complained* of Goss's sexual harassment to Nestle's HR Manager on August 31, 2004 at approximately 10:00AM; that Goss has *now* stated *any* objection to *any* alleged workplace "misconduct" by McKenna and jeopardizing McKenna's employment.

3) Nestle's *self-made* "**Catch-22**": On October 19, 2004 merely five (5) days after the termination of McKenna's employment, Nestle could not have made it any clearer: The termination of McKenna's employment was completely unrelated to *Goss* and/or Kagenski [138]:

October 19, 2004

Kevin McKenna
4885 Adamsville Road
Zanesville, Ohio 43701

Kevin:

This correspondence is provided to you in response to your e-mail dated October 18, 2004.

The decision, which led to your termination of employment, was based on your violation of the Information Security Policy as it relates to electronic communications. Additionally, you admitted to this violation. *Furthermore, your termination has no relationship to any previous conversations you may have had with our local HR Manager.*

At this time, we do not see need for continued discussion regarding this matter.

Regretfully,

Mitzi Link
Controller

cc: Dante Benincasa
Carol Kagenski

---

[138] **See Appendix p.42**; Authenticated at - Doc: 162-5 Filed: 01/26/09 Page: 96 of 98 PAGEID #: 3267

It is now quite disingenuous of Nestle to cite *Goss* in *any* relationship to the termination of McKenna's employment, let alone by "After Acquired Evidence", from no less than Goss whom Nestle states McKenna's termination was unrelated to, whom happens to be the harasser of McKenna, and who's harassment McKenna complained of.

To illustrate only one of innumerable particularly perverse manifestations of Nestle's exploitation of "After Acquired Evidence" for this Court; in Nestle's MSJ, [139], Nestle cites "*Goss Depo. Tr.* p. 97, ll. 5-24":

Q. Here's *Defendant's Exhibit 26.* The last -- first message on the page is March 15th, 2004, it's from Kevin to you. The "B"rownies, what is that referring to?
A. B was my nickname for Kevin. It stood for boys which goes back to that whole Natasha thing. Apparently there were brownies at work that day.
Q. That's not referring to anything else?
A. Well, it's talking about warming them up, *I think -- I don't recall* exactly what we were talking about, but it had something to do with him either coming on the brownies *or something like that.* I can't remember exactly now.
Q. And what are you referring to in your March 15th, 2004, e-mail that's just above that?
A. What specifically are you asking me about what was I referring to?
Q. I mean, is that an inside joke between you two? Is that sexual content?
A. I would say that's sexual content.

---

[139] Doc: 127 Filed: 03/31/08 [sealed] at page 16 of 32 at ¶2

First: There is no "*Defendant's Exhibit 26*" on the record. Second: That is 2006 *After Acquired, hear-say* deposition testimony, over two (2) years *after* McKenna's termination, where Goss is speaking for McKenna's state of mind. Third: This is mere *speculation* (i.e. – "*or something like that*") on Goss's part, clearly stating: "*I don't recall*", "*I can't remember*". That does not "establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone" (*McKennon*).

The District Court cast as a *finder of fact* (i.e. – "This is not true.") relied on Nestle's an extrapolated "articulation" of After Acquired Evidence from Goss's deposition testimony, in support of Nestle's proffered reason(s) for the termination of McKenna's employment as a basis for dismissing all McKenna's claims against Nestle:

> "McKenna asserts that the emails he wrote did not contain sexual innuendo, and that Goss's interpretation is "delusional." This is not true. The emails that McKenna sent to Goss were clearly indecent and contained sexually explicit content. *For instance, one of these emails included a description of McKenna masturbating at work and ejaculating onto* brownies. *McKenna's assertion is unfounded.*" (emphasis added) [140].

No such email exists! Clearly Goss's "After Acquired" deposition testimony "*Goss Depo. Tr.* p. 97, ll. 5-24" is *not* an email of McKenna committing lewd

---

[140] Doc: 168 Filed: 03/31/09 Page: 4 of 22 PAGEID #: 3975 at FN 2 **(Appendix pp.25-26)**

acts! Goss's October *2006* speculation(s) *cannot* have provided a basis for Nestle's termination of McKenna's employment in 2004.

b. **Nonexistent Evidence - "4 *Pornographic Pictures*" Do NOT Exist on the Record**

The defendant must articulate a legitimate, non-discriminatory reason for the employment decision. To meet this burden, "the defendant must clearly set forth, *through the introduction of admissible evidence*, the reasons for the plaintiff's rejection" (*emphasis* added). *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). "An articulation not admitted into evidence will not suffice. Thus, *the defendant cannot meet its burden* merely through an answer to the complaint or *by argument of counsel*." (*emphasis* added) *Id.* at 256 n. 9, 101 S.Ct. 1089.

It is axiomatic that if an employer *legitimately* terminated an employee's employment on such an *obvious* violation of an employer's policy, such as the employee having "4 *pornographic pictures*" in the employee's company email account; the employer would simply file an *immediate* motion for summary judgment with "Exhibit A", "Exhibit B", "Exhibit C", "Exhibit D" as attachments, and "Case DISMISSED!".

It is also axiomatic that *any* employee would *not* endure five (5) years of litigation *and* be petitioning the Supreme Court, if the employer *legitimately* terminated the employee's employment on such an *obvious* violation of an employer's policy, such as the employee having "4 *pornographic pictures*" in the employee's company email account.

Any reader of this Petition must ask the obvious questions; if Nestle were *legitimately* in possession of "4 *pornographic pictures*": 1) Why wouldn't Nestle *immediately* move for summary judgment? 2) Why wouldn't Nestle *prominently* support *any* motion for summary judgment with "*Exhibit A*", "*Exhibit B*", "*Exhibit C*", and "*Exhibit D*" of "4 *pornographic pictures*"? 3) Why would McKenna *vehemently* protest, endure five (5) years of vexatious litigation, and Petition the United States Supreme Court as a *pro-se* litigant if "4 *pornographic pictures*" were *legitimately* found in McKenna's company email account?

There is only one answer: There never was "4 *pornographic pictures*" in McKenna's company email account. There are no "4 *pornographic pictures*" that exist anywhere on the record in this case. Nestle has not supported the "articulation by *counsel*" that "4 *pornographic pictures*" provided a basis supporting the termination of McKenna's employment. There is no basis in fact that McKenna's employment was terminated on the basis that "4 *pornographic pictures*" existed in McKenna's company email account.

At the time McKenna's employment was terminated, Nestle had *not* indicated to McKenna, that McKenna's employment had been terminated on any basis relating "4 *pornographic pictures*". Nestle's HR Manager had in *general terms* informed McKenna that McKenna's employment was terminated due to alleged violation of Nestle's Electronic Communications Policy (ECP) [141].

---

[141] Kagenski Dep., p. 26, ll. 3-13; Id., p. 94, l. 23 to p. 95, l. 14; McKenna Dep., p. 100, l. 7 to p. 104, l. 6; Doc: 162-4 Filed: 01/26/09 Page: 20 of 43 PAGEID #: 3148 at Interrogatory No. 30

June 15, 2005 Nestle's HR Manager drafted an "Employer Statement" in response to McKenna's EEOC complaint [142]. Significantly the "Employer Statement" drafted by Nestle's *local* HR Manager with "first-hand knowledge" and who was *directly* involved in the decision to terminate McKenna's employment (Kagenski Dep., p. 201, ll. 1-5), does *not* reference any alleged "4 *pornographic pictures*"!

July 5, 2005 Nestle's in-house *legal counsel* who drafted Nestle's Position Statement to the EEOC *articulated* that Nestle relied on "• an email message containing 4 *pornographic pictures* of a male and a female in sexual positions, sent out from Nestle email;" [143].

March 7, 2006, Nestle's *legal counsel* reiterated: "The contents of Plaintiff's 'inbox' and 'sent items' folder included 4 *pornographic pictures* of a male and a female in sexual positions" [144].

March 31, 2008, in Nestle's MSJ Nestle's *legal counsel* alleges: "Plaintiff's termination had [...] everything to do with [...] sending and receiving *pornographic pictures*" [145], "Plaintiff's termination had nothing to do with any protected activity and everything to do with the fact that Plaintiff, an employee charged with overseeing Nestle's computer system, was sending and receiving *pornographic pictures* and emails on his company computer." [146].

The *articulations* within Kagenski and DeWitt's affidavits submitted in support of Nestle's

---

[142] Doc: 162-6 Filed: 01/26/09 Pages: 59-68 of 77 PAGEIDs #: 3328-3337

[143] Doc: 136-9 Filed: 05/22/08 Page: 6 of 15 PAGEID #: 2491

[144] Doc: 18 Filed: 03/07/06 Page: 3 of 10 PAGEID #: 160 at FN #1

[145] Doc: 127 Filed: 03/31/08 [sealed] at page 11

[146] Doc: 127 Filed: 03/31/08 [sealed] at page 14

MSJ do *not* describe nor cite "4 *pornographic pictures*" were found in McKenna company emails as Nestle *attorneys* articulate [147]. Nestle's *legal counsel* articulated, "Plaintiff's termination was based on his violation of Nestlé's ECP by sending and receiving *pornographic* and sexually explicit emails" [148].

January 26, 2009, McKenna disputes that "*pornographic pictures*" exist on the Court record in support of the articulation by *legal counsel* by stating: "FACT: NO PORNOGRAPHY ever existed in McKenna's Outlook!" [149].

March 4, 2009, instead of tangible citation to an exhibit of "*pornographic pictures*", Nestle's *legal counsel again* "articulated":

> "Plaintiff instead attempts to argue that the emails cited by Nestle were not pornographic or sexually explicit. *Plaintiff's Motion*, p. 40. ***This is ridiculous!*** *Plaintiff does not consider anything pornographic or sexually explicit.*" (***emphasis*** added) [150].

March 31, 2009, in dismissing all McKenna's claims against Nestle, the District Court accepted Nestle's *articulation*: "In the course of investigating McKenna's Outlook folder, Nestle uncovered emails McKenna had sent containing *pornographic pictures* of a female friend and a male stripper in various sexual positions" [151]. "McKenna asserts that the proffered reason for his termination, violation of the ECP, has no basis in fact. *There is no legitimate*

---

[147] Doc: 127 Filed: 03/31/08 [sealed] – "Exhibit A" ¶22(1), and "Exhibit C" ¶5 respectively

[148] Doc: 141 Filed: 06/03/08 Page: 2-3 of 8 PAGEID #: 2725-2726

[149] Doc: 162-1 Filed: 01/26/09 Page: 46-48 of 71 PAGEID #: 3038-3040

[150] Doc: 165 Filed: 03/04/09 Page: 16 of 38 PAGEID #: 3880 at ¶3

dispute that McKenna violated the ECP by, "Accessing, sending, forwarding, downloading, printing, or deliberate receipt of: *pornographic*, obscene, indecent or other sexually explicit materials" [152].

June 25, 2009 McKenna's appeal *again* raised no "*pornographic pictures*" exist anywhere on the record supporting the "articulation by *legal counsel*" that has consistently reiterated that "*pornographic pictures*" provided a basis supporting the termination of McKenna's employment [153]

July 27, 2009, *again* instead of making citation any actual exhibit(s) of "*pornographic pictures*" on the record, Nestle's *legal counsel again* "articulated" that now "Reasonable Minds Could Only Conclude" supports that 4 *pornographic pictures* existed in McKenna's company email [154].

December 23, 2009, the Court of Appeals still *accepts* Nestle's unsupported "articulation" that McKenna's employment was terminated on the basis of "sexually explicit photos" [155].

IV. The "Right to be Heard"

c. Summary Judgment standard

This Petition demonstrates only several of the genuine disputes that remain unresolved. Disputes remain to such an extent it has mandated formal complaints by a non-moving *pro-se* litigant of "Fraud

---

[151] Doc: 168 Filed: 03/31/09 Page: 3-4 of 22 PAGEID #: 3974-3975 **(Appendix p.4 at ll. 10-14)**

[152] Doc: 168 Filed: 03/31/09 Page: 11 of 22 PAGEID #: 3982 **(Appendix p.10 at ll. 16-19)**

[153] Doc: 00615599546 Filed: 06/25/2009- Pages: 64-66

[154] Doc: 00615621584 Filed: 07/27/2009 Page: 24 at section "A."

[155] Doc: 00618042195 - Filed: 12/23/2009 - Page: 4 **(Appendix p.32 at ¶2)**

on the Court", subornation of fraud, perjury and evidence tampering have been filed with the lower courts. All of these unresolved disputes and resulting inferences have *liberally construed favorably* to the *moving* party!

To be Clear: **McKenna only stipulates to the NAMES in this case are correct**. There are *innumerable* disputes that *cannot* be raised by the sheer volume of those issues, and limitations on petition size. McKenna does NOT stipulate to for instance, but not limited to; *alleged* "relationships", *non-existent* evidence, events, dates, job-title(s)/ description(s) and/or position(s) to name only a few. This Court has stated directly within the employment discrimination context:

> "The court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." (internal citations and quotations omitted) *Reeves v. Sanderson*

Plumbing Products, Inc., 530 U. S. 133, 150-151 (2000).

Clearly summary judgment is untenable in absence of *stipulation* of facts, let alone to rise the shadow of complaints "Fraud on the Court", subornation of fraud, perjury and evidence tampering against the *moving* party!

i. **The Problem: The Absence of Party Stipulation(s)**

Had a stipulation been in place *prior* to summary judgment in this case, this calamity would *easily* have been averted. However, that same perversion now presents this Court with the opportunity not just to cure the injustice in this case; this Court has a opportunity to substantially affect *enforcement* of Congressional policy "of the highest priority" *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 100 S.Ct. 2024, 2030, 64 L.Ed.2d 723 (1980), *Fogerty v. Fantasy, Inc.*, 510 U.S. 523, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (both citing *Christiansburg Garment Co. v. EEOC*, 434 U. S. 417 (1978).

If it were *well-settled* law in all employment discrimination cases that a plaintiff, particularly in cases of *pro-se* plaintiffs; would be *lawfully* entitled to full *opportunity* to enter into a stipulation of facts and claims before summary judgment before the Courts, it would provide strong incentive, shifting the burden to employers to draft *responsible* policies requiring employee *stipulations* regarding all *potential* employment discrimination issues. For instance:

• Provides *strong incentive* that *all* employee terminations procure a *stipulation* that an employee's termination is unrelated to any *internal* employment discrimination issues.

• With responsibility justly shifted to the employer: The workload upon *overburdened* employment discrimination Administrative agencies would substantially be reduced.

> • With reduced workload: Administrative agencies would be cast into Congress's intended role in determining whether unlawful employment has occurred, based upon a readily available *stipulation* of facts.
> • Eliminate Administrative agencies being cast into the role of "Fact-Finder".

• With more effective Administrative agencies; The influx and workload of employment discrimination cases into the Courts would be substantially reduced.

> • The Courts would be more efficient in the just adjudication of summary judgment in inherently fact intensive employment discrimination cases, based upon a readily available *stipulation* of facts.
> • Eliminate the Courts from unlawfully being cast into the role of "Fact-Finder" wasting resources in resolving every dispute of fact between the parities, which lawfully is a function of a jury.
> • Eliminate employer's *perverse incentive* to exploit judiciary machinery as an instrument to defeat the important congressional policy against discriminatory employment practices

ii. The Solution: The Dlott "Standing Order", An Employment Discrimination Victim's "Right To Be Heard":

Susan J. Dlott, Chief Judge from the Southern District of Ohio (Judge Dlott), from which this case arises is the author of a "Standing Order Governing Civil Motions for Summary Judgment" (Standing Order) [156] provides a pragmatic basis for sweeping change in the enforcement of employment discrimination laws.

By this Court simply enacting law that in *all employment discrimination cases* that a plaintiff, particularly in case of *pro-se* plaintiff [157], would be *lawfully* entitled to *full opportunity* to enter into a *stipulation of facts and claims* **before** summary judgment before the Courts, patterned off Judge Dlott's Standing Order; this Court now has the opportunity to enact law to alter the landscape in enforcement of employment civil-rights statutes the law would be designed to enforce, which would arguably parallel the significance of Congressional employment discrimination statutes themselves.

---

[156] http://www.ohsd.uscourts.gov/judges/dlott/Standard%20Order.pdf - **(Appendix pp.36-41)**

[157] "... in a situation in which a single poor, ignorant employee with a grievance, not a sling shot in his hand, faces a huge industrial employer in this modern day David and Goliath confrontation" *Penway v. American Cast Iron Pipe Company*, 411 F.2d 998 at 1005 (5th Cir. 1969).

REASONS FOR GRANTING

After a fair reading of facts and supporting arguments presented within this Petition, the reasons for granting this Petition should become self-evident.

I. Title VII Highest Priority

This court has on many occasions reiterated that a Title VII plaintiff is thee essential means to insure the Civil Rights Act of 1964 works, "Congress has cast the Title VII plaintiff in the role of 'a private attorney general' vindicating a policy 'of the highest priority,'" *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 100 S.Ct. 2024, 2030, 64 L.Ed.2d 723 (1980), *Fogerty v. Fantasy, Inc.*, 510 U.S. 523, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (citing *Christiansburg Garment Co. v. EEOC*, 434 U. S. 417 (1978)). "[T]he private litigant [in Title VII] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices" *McKennon* at 358 (1995).

a. Critical Opportunity for Vindication of an Important Congressional Policy:

Whether enacted into law by the most appropriate Court in this land for such a critical law to vindicate an employment discrimination statute 'of the highest priority', or by Congressional amendment of employment discrimination statutes:

For reasons argued herein and the good of all citizens of the United States, it is *imperative* that law equivalent to the Dlott Standing Order secur-

ing an employment discrimination victim's "Right to be Heard", *must* be enacted.

However, it is only *this Court* that is now uniquely positioned to vindicate *both* harms imposed upon McKenna in this case *and* for the good of all citizens of the United States.

II. **The Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, *and* sanctioned such a departure by a lower court. Justice demands an exercise of this United States Supreme Court's supervisory power (S. Ct. R. 10(a)).**

b. **Lower Court Disregard for *McKennon*:**

> "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon* at 362-63.

Nestle's dispositive pleading and the subsequent lower Courts' judgments are egregiously tainted with "After Acquired Evidence" (e.g. "*Goss Depo. Tr. ...*", etc.).

c. **Lower Court Disregard for *Harris* ("Totality of Circumstances")**

> "[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its

> severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. at 2283 (1998).

Nestle's misrepresentation of McKenna's legitimate claims and the lower Courts' disregard of McKenna's Supervisory *and* Co-worker Retaliatory Harassment claims when viewed within the requisite "totality of circumstances", makes the dismissal of *any* claims against Nestle untenable.

d. "Attorney Misconduct"/"Fraud on the Court"

"The inherent power encompasses the power to sanction attorney or party misconduct, and includes the power to enter a default judgment. See *Chambers*, 501 U.S. at 43-45, 111 S.Ct. at 2132-33; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66, 100 S.Ct. 2455, 2463-64, 65 L.Ed.2d 488 (1980); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118-19 (1st Cir. 1989); *Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir.1982)." *Shepherd v. American Broadcasting Companies, Inc.*, 62 F. 3d 1469 – 1475 (DC Cir. 1995).

i. Case in Chief:

Ample evidence of attorney *and* party misconduct is now before this Court in a matter "of the highest priority" (*Fogerty at* 523), that is clearly sufficient to support entering default judgment against Nestle.

Alternatively, by refusing to remand this case back to the District court pending final resolution of all McKenna's complaints of "Attorney Misconduct" presently filed with the lower Courts, this Court would effectively raise the bar from: facts and inferences being *liberally* construed favorably to McKenna, to McKenna bearing a "clear and convincing" burden in an attempt to vindicate an "important congressional policy against discriminatory employment practices" *McKennon* at 358 (1995).

ii. Related Case:

Beyond the "Attorney Misconduct" referenced within this Petition. Other perverse acts of "Attorney Misconduct" which occurred during the course of these proceedings have been referenced within **Petition 10-21**, "Aug 18 2010 DISTRIBUTED for Conference of September 27, 2010".

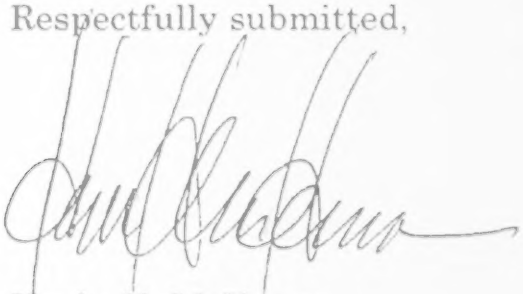
e. Lower Court Disregard for Summary Judgment Standards

Clearly summary judgment is untenable in absence of *stipulation* of facts, let alone rise to the level of complaints "Fraud on the Court", subornation of fraud, perjury and evidence tampering *against* the *moving* party!

CONCLUSION

For the above reasons, as Justice demands, and for any other reason(s) this Court may deem appropriate when *liberally* construed most favorably to the Petitioner *pro-se*, a writ of certiorari is appropriate to review the order of United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



Kevin H. McKenna
Petitioner - Pro-Se
4885 Adamsville Road
Zanesville, Ohio 43701
(740)452-3124